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In the Supreme Court of the United States  
OCTOBER TERM, 1978

~~78-1803~~

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN RICHARD HUMPHRIES

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BRIEF IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT

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Undersigned Counsel, on behalf of John Richard Humphries, opposes the Petition For a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit previously filed by the United States Government in this case.

**OPINION BELOW**

A copy of the opinion of the Court of Appeals for the Ninth Circuit has been attached to the government's petition for Writ of Certiorari as Appendix A thereto.

**JURISDICTION**

The jurisdiction of this court is invoked by the United States government pursuant to 28 U.S.C. Section 1254(1).

### QUESTION PRESENTED

Did the Ninth Circuit Court of Appeals commit error in ruling that the District Court properly suppressed certain evidence concerning the identity and alleged criminal participation of Respondent in this case.

### STATEMENT

As noted in the Petition for a Writ of Certiorari filed by the government, Respondent and four others were charged in a four-count indictment charging multiple violations of the United States Code relating to importation and possession of marijuana.

Two separate evidentiary hearings were conducted before two separate District Court Judges. It is from the factual determinations made by these two Judges that the Government appeals.

A summary of the evidence presented by the Government before these Courts is as follows:

*1. The evidence adduced by the Government at the hearing on the Motion to Suppress before the Honorable Carl A. Muecke on October 6, 1977.*

At the initial Hearing on Respondent Humphries' Motion to Suppress the Government produced only two witnesses who testified as follows:

Bureau of Indian Affairs (BIA) Agent Everett Little Whiteman, discovered a crashed airplane containing approximately One Thousand Five Hundred (1,500) pounds of marijuana on October 21, 1976 at approximately 5:00 p.m. (I Tr. p. 46-50)<sup>1</sup> Agent Little White-

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<sup>1</sup> "I Tr." refers to the Reporter's transcript of the hearings on Respondent Humphries' Motion to Suppress on October 6, 1977, and "II Tr." refers to the Reporter's transcript of the Hearing on the Government's Motion for a Determination of Admissibility of Evidence held on February 15, 1978.

man testified that this was the first case in which he participated where a large quantity of marijuana was seized and arrests were made. (I Tr. p. 97)

Agent Little Whiteman testified that any non-Indian individual in the San Carlos area for several days following this crash was considered a suspect in the case. (I Tr. p. 97, line 23-p. 98, line 2)

Pursuant thereto, Agent Little Whiteman stopped a Co-Defendant, James Douglas Jameson, on the day following the crash on a road outside the town of San Carlos. Jameson's name, make of car and license number were obtained at that time. (I Tr. p. 52-53)

In the afternoon of the following day, Agent Little Whiteman detained two more individuals (Co-Defendants Rubio and Torres) who were in the San Carlos area. These detentions and/or arrests occurred two days after the crash. (I Tr. p. 54-55) Agent Little Whiteman considered these individuals also to be suspects and obtained from them biographical information. (I Tr. p. 100)

The only other witness produced by the government was Mr. Frank Sisto, a resident of San Carlos. Mr. Sisto testified that on the evening of October 23, 1976 some two days after the discovery of the downed aircraft, Mr. Sisto had radioed the police dispatcher in San Carlos to inform the San Carlos police that two individuals had come to his residence on Hilltop Road and that he had driven them to San Carlos. Mr. Sisto advised the police dispatcher that he did not know the two individuals and that they were non-Indians. However, there was nothing suspicious about the two individuals. (I Tr. p. 20-24; p. 27; p. 31-32)

Acting on this information, Agent Little Whiteman

ordered the illegal arrest of Respondent Humphries and Co-Defendant Rubio. (I Tr. p. 71-80; p. 101-106)

The government did not contest Judge Muecke's ruling in its arguments and written memoranda submitted to the Ninth Circuit Court of Appeals that this initial arrest of Respondent Humphries was illegal. (Opening brief of the government to the Ninth Circuit Court of Appeals, p. 4)

Agent Little Whiteman testified that he obtained the name, fingerprints, birthdate, social security number, address, photograph, and a statement from Respondent Humphries at the time of his illegal arrest. (I Tr. p. 64-66; p. 103)

Agent Little Whiteman testified that he provided this information to the Federal Drug Enforcement Administration who, in turn, provided it to the Arizona Department of Public Safety. Agent Little Whiteman testified that the reason he took the photograph of Respondent Humphries was to utilize it to later identify Respondent Humphries as a criminal defendant in this matter. (I Tr. p. 98-100)

This was the totality of evidence which the government presented to the honorable Carl A. Muecke in response to Respondent Humphries' Motion to Suppress.

Respondent Humphries then called as his witness Agent Douglas R. Stine of the Arizona Department of Safety, Narcotics Enforcement Division. Agent Stine testified that he received a photograph and the aforementioned biographical information taken by Agent Little Whiteman and utilized it to obtain a driver's license photograph of Respondent Humphries. Agent Stine testified that he then utilized this photograph in his inves-

tigations. Stine testified that during an investigation of a telephone call from a man named Thompson to a telephone number in Scottsdale, he had obtained the Scottsdale address, gone to that address and identified Humphries as a criminal defendant in this matter from the use of that photograph. (I Tr. p. 106-108)

Based upon these facts, the honorable Carl A. Muecke granted Respondent Humphries' Motion to Suppress on January 26, 1978.

*2. The evidence adduced by the government before the honorable Ronald M. Davies on February 15, 1978.*

Following the ruling by the honorable Carl A. Muecke, the government filed a Motion for Determination of Admissability of Evidence on February 3, 1978.

The government sought by this motion to have the District Court order the following identification evidence admissible during the course of trial:

1. Identification testimony by an unindicted co-conspirator, Dennis James Thompson.

2. Identification testimony of Frank Sisto.

3. Photographs taken by Department of Public Safety's Agents of Respondent Humphries during surveillance of a residence in Scottsdale, Arizona.

At that hearing, the following evidence was produced by the Government:

Agent Little Whiteman testified that all the information that he illegally obtained from Respondent Humphries was given to the Federal Drug Enforcement Administration and the Arizona Department of Public Safety so that they could investigate Mr. Humphries. (II Tr. p. 19-20)

Agent Little Whiteman testified that he had received

information from a logging truck driver that a hitchhiker had been picked up in the vicinity and near the time when the aircraft had landed. The logging truck driver had driven this hitchhiker to Cutter Airport. (II Tr. p.10; p. 13) Agent Little Whiteman testified that when he went to Cutter Airport to investigate the hitchhiker, he found Respondent Humphries' name and the aforementioned biographical information. Moreover, Agent Little Whiteman had contacted Mr. Souza, a Federal Narcotics Agent, and asked Mr. Souza to investigate Respondent Humphries. Agent Little Whiteman admitted that the only way that he knew the identity of Mr. Humphries was as a result of the illegal arrest of Mr. Humphries. Without that contact, Agent Little Whiteman testified that he would have had no way of identifying Mr. Humphries whatsoever. (II Tr. p. 21-23)

Agent Little Whiteman testified that he provided his case report and Mr. Humphries' photograph to the Department of Public Safety for their follow-up investigation. (II Tr. p. 24)

Agent Little Whiteman testified that as a result of his illegal arrest of the Defendant, and as a result of conversations had with Federal Agent Souza, Agent Whiteman included in his report that Federal Agent Souza had informed him that Mr. Humphries was a suspect in this marijuana case. This report was in turn handed over to the Arizona Department of Public Safety. (II Tr. p. 29-30)

Agent Whiteman testified that he transmitted his report and all information he possessed to the Arizona Department of Public Safety on October 26, 1977, three days after the illegal arrest of Mr. Humphries. (II Tr. p.

30) This report indicated that Mr. Humphries was a suspect in this case. (II Tr. p. 31-32)

Thereafter, the government called Arizona Department of Public Safety, Narcotics Enforcement Officer Douglas R. Stine. Agent Stine testified that he became involved in this investigation on October 26, 1976 after he and his partner received information from the San Carlos Police Department relative to the case. (II Tr. p. 36)

Agent Stine testified that he received from the San Carlos Police the following information:

1. Location and type of aircraft which had crashed;
2. The name "James Thompson" which was discovered on a motel receipt inside the aircraft. He also received a fuel receipt from the crashed airplane in the name of "Dave Waddle";
3. Information that the pilot had been traced to a motel in Globe, Arizona;
4. Complete information about the five persons, including Humphries, who had been stopped within a few days after the plane crash. (II Tr. p. 37)

Agent Stine testified that one of the persons identified in the San Carlos area, "Lon Raymond Jordan," was familiar to him as a narcotics investigator since he had had contact with Mr. Jordan in the past. However, Mr. Humphries' name was not significant to him. (II Tr. p.38)

Agent Stine testified that he, as had Agent Little Whiteman, contacted a federal customs pilot, Agent Al Souza. (II Tr. p. 38-39)

Agent Stine testified as to the steps he had taken to trace the airplane registration and to locate the pilot,

James Thompson. He testified that during the course of this investigation, he located a telephone number in Scottsdale, Arizona, to which the pilot, Thompson, had placed telephone calls. (II Tr. p. 39-42)

Agent Stine testified that he obtained the address for this Scottsdale telephone number and drove to that address. As he drove by the address, Agent Stine observed a Monte Carlo automobile parked in front of the residence that "generally fit the description of the vehicle that had been stopped by the Indian Police . . ." (II Tr. p. 42)

Agent Stine testified that he drove up the driveway to this residence to determine the license number of the Monte Carlo vehicle and as he approached the Monte Carlo, he encountered Mr. Humphries. Stine testified that he was able to identify Humphries from a driver's license photograph which he had requested from the Arizona Department of Motor Vehicles after obtaining the information from the San Carlos Police. Stine admitted that prior to being given the name of Mr. Humphries by the Indian Police he did not have the name "John Humphries" in connection with this investigation. (II Tr. p. 44-45)

Initially, Stine denied that he was able to recognize Respondent Humphries as a Defendant by virtue of the illegal photograph taken by the San Carlos Police. Agent Stine on cross examination was asked to explain why his report indicated that "Mr. Humphries appeared exactly like the photo taken of him by the Indian Police." Stine stated that that portion of the report was probably written by his partner, Tom Rogers. The government then informed the court that the identification of Respondent

Humphries by Agent Stine on the date that he drove into the driveway would not be introduced as evidence. Thereafter, Stine changed his testimony and testified that Agent Rogers had told him that the person they had seen was Mr. Humphries, and that he looked exactly the way he did in the photograph taken by the Indian Police. Thereafter, Stine included that in his report. (II Tr. p. 56-58)

Stine admitted that the only reason he had obtained Humphries' driver's license photo was because of the information provided by Agent Little Whiteman. He further testified that he had received Agent Little Whiteman's report and that that report had indicated that Agent Souza had stated that Mr. Humphries was a suspect in this case. (II Tr. p. 59-60) Stine testified that because of the encounter with Mr. Humphries at the Scottsdale residence, a 24 hour per day surveillance was established between November 29, 1976 and December 4, 1976. Twenty to thirty different individuals were seen entering and leaving that residence during this period of time and photographs were taken of these individuals. (II Tr. p. 45)

Stine testified that the surveillance was established because he was aware that Mr. Humphries was the same individual who had been arrested by the Indian Police and that Stine was aware of this fact because Humphries appeared as he had in the photograph that the Indian Police had taken. Stine testified that because of the photograph of Mr. Humphries and the license plate on the Monte Carlo, he felt justified in establishing a 24 hour per day surveillance. (II Tr. p. 61)

During the period of this surveillance, Stine took

photographs of the individuals entering and leaving the Scottsdale residence and in some of those photographs, Respondent Humphries' picture appears. (II Tr. p. 45-46)

Stine testified that ultimately (approximately February, 1977) he discovered the pilot, Mr. Thompson. At that time, Stine specifically asked Mr. Thompson if he knew Mr. Humphries. Thompson, in response to these specific questions, indicated that he did. (II Tr. p. 48-50)

During the course of the interviews with Thompson, Stine asked Mr. Thompson about the individuals who were suspects in this case. Humphries was one of those suspects. Agent Stine admitted that only in response to specific questions about Mr. Humphries did Mr. Thompson give answers regarding Mr. Humphries' alleged involvement. Agent Stine then showed Mr. Thompson numerous photographs, including the photographs taken by the Indian Police. Stine testified that in response to his questions as to whether or not the person in the photograph was the Mr. Humphries of whom the pilot was speaking, Mr. Thompson indicated that it was the same Mr. Humphries. (II Tr. p. 62)

Stine admitted that the name "Humphries" had never come up in his investigation until provided by the Indian Police. The Indian Police provided the name and that is where Agent Stine testified that he originally became interested in investigating Mr. Humphries. This interest led to Agent Stine's locating Mr. Humphries, led to the taking of photographs of him during surveillance, and led to Stine's questioning of Mr. Thompson as to whether or not Humphries was allegedly involved in this criminal activity. (II Tr. p. 64)

Stine ultimately testified that it was the information provided by the San Carlos Indian Police at the outset that led to all his subsequent investigation of Mr. Humphries, one step to another. (II Tr. p. 65)

At that point, the government rested and presented no further evidence.

It was noted that the government had failed to call the pilot, James Thompson, even though he was present in the court house and available to testify. (II Tr. p. 68)

Thereafter, the parties argued to the honorable Ronald N. Davies as to the legality of the search of the Scottsdale residence which produced the license plate number of the Monte Carlo automobile. (II Tr. p. 71-74) In argument, it was noted that Agent Stine admitted that the information provided by the Indian Police led step-by-step throughout his entire investigation with regard to Mr. Humphries. Because of that, all evidence which the government sought to introduce by way of its motion was tainted.

The court stated that it agreed with Judge Muecke's ruling and felt that this was the time for the government to demonstrate that it had independant, untainted evidence. Judge Davies indicated to the government that he felt there was a problem regarding the pilot as to what his evidence was going to be and noted for the government's benefit that the court felt that the government had a problem with the case. (II Tr. p. 74-75)

Respondent's counsel argued that the government was required to put on evidence that there was no taint as to the three items of identification evidence sought to be admitted. The court was reminded that Stine had testified that his entire investigation, including his con-

versation with the pilot, Thompson, led step-by-step from the original illegal arrest of Humphries. Humphries was a suspect as a result of his illegal arrest by the Indian Police. Government agents utilized this illegal arrest to obtain background information on Humphries, located Mr. Humphries, and then made an illegal search at Mr. Humphries' Scottsdale residence so as to discover an automobile license plate number and identification of an automobile which had been seen near the location of the downed plane. As a result of this information, a surveillance was established which resulted in more photographs of Respondent Humphries.

Respondent's counsel argued that government agents questioned pilot, Thompson, and in response to their questions, all of which questions were formulated by the original illegality, Thompson provided identification evidence. (II Tr. 75-80)

Counsel noted that while the government asserted that the information which Thompson might provide if he were called to the witness stand to testify was untainted, the government failed and refused to call Mr. Thompson even though he was peculiarly available to testify as a government witness. (II Tr. p. 77-78)

Further argument ensued before the District Court and a review of the transcript of proceedings demonstrates that Judge Davies was bothered by the lack of evidence produced by the government to demonstrate that Thompson's identification evidence was untainted. Judge Davies stated that the gut issue before the court was the failure of the government to put on sufficient evidence to show lack of taint, notably the failure to call Thompson as a witness when he was available to testify. (II Tr. p. 89; p. 85-99)

Assistant United States Attorney, Edmund Noyes indicated to the court that he was satisfied with the evidentiary showing made by the government. (II Tr. p. 99)

Thereafter, the honorable Ronald M. Davies denied the government's Motion to Determine Admissability of Evidence on the grounds that the government had not put on sufficient evidence to establish that the taint had been dissipated or that the evidence sought to be utilized had been come at by means distinguishable from the taint. (II Tr. p. 101-103)

The Court of Appeals affirmed the suppression of two separate pieces of identification evidence; from this ruling the government seeks certiorari.

The Court of Appeals affirmed the suppression of photographs of Respondent Humphries taken during the surveillance of the Scottsdale residence on the ground that this evidence was the fruit of Humphries initial and illegal arrest by the BIA police.

The Court of Appeals also affirmed the suppression of any testimony by the pilot, Thompson, concerning Respondent Humphries. (Governments App. A, 19a-21a)

The Court of Appeals held that there was no taint from the illegal arrest of Respondent Humphries which attached to Agent Stine's location of Thompson. However, the Court held that Thompson's testimony was properly suppressed since the evidence before the District Court was clear that Thompson had implicated Humphries only upon being asked specifically about him. The evidence was clear that Stine questioned Thompson specifically about Humphries only because of information concerning Humphries' identity which was tainted by the initial illegal arrest.

The Court of Appeals engaged in an analysis of the *United States vs. Ceccolini*, 435 U.S. 268, and noted that Thompson answered Stine's questions only as part of a "plea agreement." The court held that "under such circumstances, it is unreasonable to infer that (Thompson's) response to (Stine's questions) was sufficiently an act of free will to purge the primary taint...." The court held that the testimony of Thompson concerning Humphries was tainted and was properly suppressed.

In a footnote (App. A. 21a, footnote 15,) the court stated that,

"We decide that, even if Ceccolini is applicable to a case such as that at hand, the standards for dissipation are not met *under the facts and circumstances before the court.*"(emphasis added)

#### **REASONS FOR DENYING THE PETITION**

The petition submitted by the government presents two separate issues and/or grounds for granting the petition. These are as follows;

1. The government first posits as the issue: Whether the testimony of a witness who could identify a defendant as a participant in an offense should be suppressed as "tainted fruit" of an unlawful arrest of the defendant, when the police learn of the witness's identity and his knowledge of the crime by lawful means unrelated to the arrest.

The government then analogizes this issue to the present matter pending before this court in *United States v. Crews*, Cert. Granted No. 78-777, (Feb. 21, 1979).

The government's analysis of the question before this court fails entirely.

At no time before the two District Court Judges who heard the motions nor before the Ninth Circuit did the government phrase the issue in this manner. It was clear below and the record is clear that while Thompson's identity was obtained lawfully, information regarding Thompson's knowledge of the crime was not obtained by means "unrelated to the unlawful arrest."

The record is clear that once having obtained the identity of Thompson, Agent Stine utilized all of the fruits of the initial and unlawful arrest of Respondent Humphries to specifically obtain information relating to Humphries for the purpose of prosecution.

The only issue presented in this matter is whether the two District Court Judges hearing the evidence in this matter committed reversible error in suppressing the identity testimony regarding the participation of Respondent Humphries insofar as it relates to the testimony of Thompson and insofar as it relates to the fruits of the surveillance conducted by Narcotics Officer upon the Scottsdale residence. Those factual determinations made by two District Court Judges and affirmed by the Ninth Circuit Court of Appeals upon its review of the evidence presented the District Court Judges does not warrant review by this Court. It is a factual determination of the step-by-step taint which followed from the government's concededly unlawful arrest of Respondent Humphries.

The matter of *United States vs. Crews*, Supra, is simply inapplicable to the present case. The government argues that Crews applies to the facts of this case and states "the record here shows, . . . , that Officer Stine located and contacted Thompson and learned of his

*knowledge of the crime by pursuing a line of investigation entirely independent of the arrest of Respondent by the BIA.*" (Government's petition for Writ of Certiorari, p. 11)

This is simply not true. The evidence presented to the District Courts and to the Ninth Circuit was that Stine did locate Thompson independent of the arrest of Respondent. However, it is equally clear that Stine learned of Thompson's knowledge of the crime by utilizing the tainted fruits of Respondent's initial illegal arrest.

Thus, the government seeks by the way of its petition to have this court overturn factual findings made by two different District Court Judges and affirmed by the Ninth Circuit Court of Appeals. These factual determinations were that the government utilized the information illegally obtained from Respondent's illegal arrest to make a particularized inquiry to Thompson about Respondent's criminal culpability. This particularized inquiry would not have been made had not the initial illegal arrest made Agent Stine aware of Respondent's identity.

It should further be noted that the government had the pilot, Thompson, available for testimony before the District Court. The transcript of proceedings is clear that the District Court invited the government to have Thompson testify so as to clarify this precise point. The government refused to do so.

This factor, perhaps more than any other, mandates that this petition be denied. The government seeks here to upset a factual determination as to an area in which they had the ability to have their witness, Thompson, testify so as to clarify it for purposes of appeal. The

government chose not to so act and should now be precluded from arguing that Thompson would have disclosed to Agent Stine or any other agent the identity or alleged criminal activity of the Respondent without the particularized inquiry of Thompson which was utilized in this case.

2. The government next posits as the issue: Whether, when an unlawful search, seizure or arrest first leads police to suspect an individual's criminal activity and serves in part as the stimulus for their subsequent investigation of him, all evidence developed in such investigation must be suppressed as the tainted fruit of the unlawful arrest.

The government has again misstated the issue presented.

It is Hornbook Law that if an unlawful search, seizure or arrest leads the police to suspect an individual as a criminal and serves in part as stimulus for their subsequent investigation of that individual, only that evidence developed as a result of the initial taint is suppressible. Neither of the District Court Judges involved nor the Ninth Circuit held that all evidence developed by such investigations is to be suppressed.

The government states at page thirteen of its petition:

"At stake here is an issue of some moment for future application of the exclusionary rule: When an illegal search or seizure has the effect of focusing suspicion on a particular individual, to what extent is evidence disclosed by subsequent, lawfully conducted investigations of that individual to be deemed a suppressible fruit of the original, suspicion-engendering violation? The resolution of this question by the Court of Appeals conflicts with

the decisions of the Second Circuit and is, we submit, contrary to proper attenuation analysis as outlined by this Court."

This is a total misstatement of the decision of the Court of Appeals for the Ninth Circuit in this matter. In no conceivable way does this decision conflict with any decision cited by the government in its petition. The government argues that the Court's conclusion in this case "suggests that whenever some unlawful act causes the police to suspect an individual of criminal conduct, and that suspicion serves in part as the impetus for a subsequent investigation of the individual, all of the fruits of that investigation are tainted and must be suppressed." (Government's Petition, p. 14)

The decision of the Court of Appeals for the Ninth Circuit speaks for itself. It is apparent that the Court did not suppress all of the "fruits" of the initial illegality in this matter. The Trial Court made a factual determination under the unique circumstances of this case that a step-by-step taint had followed from the Respondent's illegal arrest and served as the basis for the identification of Respondent by the alleged pilot, Thompson. Moreover, the photographs taken during the surveillance of the Scottsdale residence were factually determined to be tainted in view of the manner and the basis on which Agent Stine and the Arizona Department of Public Safety decided to take such photographs.

A review of the facts in this matter and of the decision by the Ninth Circuit Court of Appeals compels the following conclusions:

1. There is no conflict of decisions between the Ninth Circuit Court of Appeals and any other Circuit Court regarding the facts of this case;

**2.** The issues presented by way of this Petition are not important to any other cases; the decision of the Ninth Circuit Court of Appeals is a factual determination based upon the peculiar facts and circumstances of this case; the decision turns upon its own facts and it will affect other potential criminal defendants than the litigants in this matter;

**3.** The issues presented by the Government's Petition are not the issues which were ruled upon by the Ninth Circuit Court of Appeals and are irrelevant to the factual background of this matter. Upon a review of the peculiar facts and circumstances in this matter, it is apparent that the decision of the Ninth Circuit Court of Appeals is correct without regard to the issues sought to be raised by the Petition. As a result thereof, this court is not likely to reach the alleged issues presented by the Petition.

#### **CONCLUSION**

The Petition for a Writ of Certiorari should be denied.  
Respectfully submitted.

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JULY 1979